

**Wind-Chester Roofing Products, Inc. and United Steelworkers of America, Local 6252, AFL-CIO-CLC. Case 6-CA-22079**

May 10, 1991

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND OVIATT

On October 2, 1990, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief; and the General Counsel filed limited exceptions, a supporting brief, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions<sup>1</sup> and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> conclusions, and remedy as modified, and to adopt the recommended Order, as modified.

The judge found that the Respondent failed to adhere to its contract with the Union by failing to provide the required medical insurance, or its equivalent, at the time the Respondent assumed the contract on December 14, 1988. The judge further found that Section 10(b) bars finding a violation or providing a remedy more than 6 months before the filing of the charge on September 11, 1989.<sup>3</sup> Accordingly, he dated the remedy from March 11. On exception, the General Counsel contends that the remedy should date from December 14, 1988. We agree with the General Counsel.

<sup>1</sup>The Respondent excepts, inter alia, to a finding of liability after July 5, 1989. On that date, the Respondent contends, the parties reached an impasse in bargaining over the health care benefits and the Respondent was free to implement its last position.

The Respondent did not raise the impasse defense in its answer or at the hearing. The issue, therefore, has not been litigated. The Board finds a contention untimely raised and waived when a party raises it for the first time in exceptions to the Board. See *Yorkaire, Inc.*, 297 NLRB 401 (1989). Accordingly, we find that the impasse contention was waived, and we will not consider it.

<sup>2</sup>The judge's decision omitted jurisdictional findings in this matter. As alleged in the amended complaint and admitted in the answer, the Respondent is a corporation, with a place of business in Chester, West Virginia, that engages in the manufacture and nonretail sale and distribution of asphalt roofing products; the Respondent annually sells and ships from West Virginia products, materials, and goods valued in excess of \$50,000 directly to points outside the State of West Virginia; the Respondent annually purchases and receives at its West Virginia facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of West Virginia; the Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup>All subsequent dates refer to 1989 unless specified otherwise.

Pursuant to the contract provisions, the Union gave notice of a midterm reopener to negotiate certain issues. The parties discussed health insurance coverage during the negotiations. At the first bargaining session in January, the Respondent asked to be allowed to substitute an "equivalent" health care plan, which could be obtained at less expense than the Blue Cross and Blue Shield Flex-Care III plan required by the contract. The Union agreed to accept an alternative plan if it were "equivalent."

Prior to July 5, on several occasions the Respondent reiterated the parties' understanding that the Company would obtain equivalent health care coverage and that, in the meantime, employees should submit qualified medical bills to the Respondent for payment.<sup>4</sup> Although the Respondent stated that it was unsure where it would locate the funds, the Respondent assured the Union that it would pay the bills and obtain equivalent health care coverage, i.e., comply with the understanding reached during bargaining.<sup>5</sup> The Respondent's secretary-treasurer testified, however, that on July 5:

I told [the Union president] that Wind-Chester recognized its liability to pay qualified bills from the 14th of December 1988 and subsequent; however, there were no monies available to pay those bills, and they promptly would be paid from funds available when they become available, whenever that is, without stating when that would be, or *whether* that would be. [Emphasis added.]

As of the time of the hearing, the Respondent had failed to provide its employees any medical insurance and the Blue Cross and Blue Shield Flex-Care III plan was not in effect. All of the employees' medical bills that have been submitted as directed by the Respondent remain unpaid. At least 16 employees have submitted medical bills which exceed \$20,000 in total.

We find that the Respondent's July 5 statement signaled a retreat from the parties' understanding regarding the payment of the medical bills. Before July 5, the parties had an understanding that the Respondent would pay submitted bills and provide an agreed-on alternative plan. The Respondent, by suggesting for the first time on July 5 that the bills might not be paid, retreated from its assurances that qualified bills would be paid and equivalent health care coverage would be obtained.

We conclude that the unfair labor practice in violation of Section 8(a)(5) initially occurred on July 5 when the Respondent first indicated that it considered

<sup>4</sup>Although the parties apparently never signed an agreed-upon reopener amendment to the contract, the issue of the Respondent's insurance obligations did not prevent completion of the reopener agreement and the parties' understanding on this issue remained unquestioned.

<sup>5</sup>We find that the Union's decision to hold in abeyance the processing of a grievance filed after the first bargaining session (at which time the Respondent assured the Union that it would provide equivalent medical coverage) evidences that the parties reached an understanding about the medical coverage.

itself free to renege on the understanding to pay qualified bills and provide equivalent health care coverage.<sup>6</sup> Although Hrkman's July 5 statement is not an outright repudiation of the parties' contract, it clearly violates the understanding arrived at by the parties in negotiating the reopener agreement.

Because the unfair labor practice occurred on July 5, the 10(b) period did not begin to run until that date, and the September 11 charge was filed within the 10(b) period. See *Universal Enterprises*, 291 NLRB 670 (1988) (where the parties bargained for postponement of a contractual obligation, the violation occurred at the respondent's later unilateral refusal to comply with the new agreement). As the Respondent's failure to pay all qualified medical bills dating back to December 14, 1988, constituted a violation of the Act as of the refusal, it follows that the remedy for this violation is that the Respondent pay all those bills, and we amend the judge's remedy section accordingly.<sup>7</sup>

#### AMENDED CONCLUSION OF LAW

Substitute the following for the judge's Conclusion of Law 3.

"3. By failing to adhere to its agreement with the Union to pay employees' qualified medical bills dating back to December 14, 1988, and to maintain the health insurance program provided for in the collective-bargaining agreement or its equivalent, the Respondent violated Section 8(a)(5) and (1) of the Act."

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Wind-Chester Roofing Products, Inc., Chester, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

<sup>6</sup>In Member Oviatt's view, there may be limited circumstances in which an employer's temporary inability to pay may constitute a defense to an allegation that it unilaterally and unlawfully ceased contractually required payments to union benefit funds. To make this defense successfully, an employer must establish that it continued to recognize its contractual obligations and thus did not repudiate the contractual provisions. To satisfy this requirement, an employer must prove that it requested to meet, or did meet, with the Union in a good-faith attempt to resolve the problem. The Respondent here excepts to the judge's reasoning that the Respondent was not under "financial constraint" because the Respondent's owner could have supplied additional funds. Assuming for the sake of argument that the Respondent is correct in its claim that its owner cannot be required to honor the Respondent's obligation under the Act, Member Oviatt finds that the Respondent has not adequately demonstrated its good-faith adherence to the contract and its bargaining obligation. It does not assert that it honored its bargaining obligation other than by a nebulous undertaking, as stated in its brief, "to pay medical claim only when, if ever, it had the financial wherewithal." Thus, regardless of whether or not the Respondent was in fact financially constrained, it has not, in Member Oviatt's view, done that which it could have to demonstrate its adherence to the contract and the bargaining process. To the contrary it declines to acknowledge that obligation.

<sup>7</sup>We shall also modify the judge's recommended Order to conform to the violation found.

"(a) Failing to adhere to its agreement with the Union to pay employees' qualified medical bills dating back to December 14, 1988, and to maintain the health insurance program provided for in the collective-bargaining agreement or its equivalent."

2. Substitute the following for paragraph 2(a).

"(a) Make whole unit employees for any uncompensated medical expenditures, pay any unpaid medical bills, and forthwith institute the Blue Cross and Blue Shield Flex-Care III plan provided for in its collective-bargaining agreement or any equivalent plan acceptable to the Union, in the manner set forth in the remedy section of the judge's decision, as modified by the Board's decision."

3. Substitute the attached notice for that of the administrative law judge.

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to adhere to our agreement with the Union to pay employees' qualified medical bills dating back to December 14, 1988, and to maintain the health insurance program provided for in the collective-bargaining agreement or its equivalent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole unit employees for any uncompensated medical expenditures, WE WILL pay any unpaid medical bills, and WE WILL forthwith institute the Blue Cross and Blue Shield Flex-Care III plan provided for in our collective-bargaining agreement or any equivalent plan acceptable to the Union, in the manner set forth in the Decision and Order of the National Labor Relations Board.

WIND-CHESTER ROOFING PRODUCTS, INC.

*Kim Siegert, Esq.*, for the General Counsel.

*Donald Lucidi, Esq.* and *Donald J. Humphreys, Esq.* (*Humphreys & Nubani, P.C.*), of Pittsburgh, Pennsylvania, for the Respondent.

*Tim Neal*, of Wheeling, West Virginia, for the Charging Party.

#### DECISION

BERNARD RIES, Administrative Law Judge. This case was heard in Wheeling, West Virginia, on March 28, 1990. The

gist of the amended complaint<sup>1</sup> is that Respondent<sup>2</sup> violated Section 8(a)(5) of the Act in one of two ways: by notifying the Union on or about July 5, 1989, that it would not provide any health care benefits for unit employees, whether incurred in the past or in the future, Respondent either failed to continue in full force its December 14, 1988, contractual obligation to provide health benefits or failed to fulfill verbal and written assurances given between January and June 1989 to provide health care benefits equivalent to those set forth in the December 14, 1988 contract.

Briefs were received from the parties on May 2, 1990. On consideration of the briefs, a review of the transcript of proceedings and the exhibits, and my recollection of the demeanor of the witnesses, I make the following

#### FINDINGS OF FACT

##### I. THE FACTS

The facility in question manufactures roofing products, having done so for several years under the ownership of different entities. The plant closed in 1982, but was reopened (operating as Chester) under an employee stock option plan in April 1988, and the new company executed a 3-year collective-bargaining agreement with the Charging Party Union. The agreement stated, in article 14, "The Company will provide without cost to the employees the Blue Cross And Blue Shield Flex-Care III Comprehensive major medical benefits insurance program effective December 1, 1987. Copy attached hereto marked Exhibit B."

The ESOP was not a success, and in September 1988, Blue Cross notified the Chester employees that their coverage under the Flex-Care III plan was being terminated because of failure of the employer to pay premiums. Chester gave up the ghost in October 1988, but found a buyer, a conglomerate named SME Industries, Inc. The latter agreed to hire the Chester employees and to "restitute the USW union contract."

Ownership of the assets and property was transferred effective December 14, 1988, to a new, wholly owned subsidiary of SME named "Wind-Chester Roofing Products, Inc." Most or all of Chester's 45 employees were hired by the new company, and Respondent admits that it is a "successor" to Chester and that it assumed the collective-bargaining agreement between Chester and the USW, subject to certain presently irrelevant modifications.

The agreement contained a reopener clause authorizing either party to ask in February 1989<sup>3</sup> for further negotiations "with respect to wages, insurance, pension and other issues as determined by either party." The Union evidently invoked this right, and at a meeting on January 18, presented a wide-ranging summary of proposals to Respondent. The only reference contained in the proposal to "Insurance" merely stated, "Information forthcoming." Larry Lamb, the president of

the Charging Party, testified that when the subject of insurance arose, Respondent's secretary-treasurer Nick Hrkman stated that the Company believed it could get "equivalent" coverage to the currently inapplicable Flex-Care plan at a cheaper rate if it had the opportunity to shop around for different providers. Lamb said that the Union did not care "as long as we had the equivalent coverage."<sup>4</sup>

On January 26, as a "protective measure," the Union filed a grievance asserting the failure to reinstate the Flex-Care plan to be a violation of the bargaining agreement and asking that the benefit be reinstituted and made retroactive to December 14, 1988 (but also noting that the grievance should be held in abeyance because of "SME Corp. willingness to comply with the insurance provision in the contract").

At the next negotiating meeting on January 31, Respondent made a written counterproposal which, inter alia, "[requested] the right to choose alternative carrier offering equivalent coverage," and also told the Union in the interim to turn medical bills into the office, "that they would take care of them." The Union apparently acquiesced.

At the February 15 meeting, Lamb asked Personnel Manager Mark Sharpe if a provider had been found; he said no, but the employees should continue turning in bills to the office. Respondent also made another written counterproposal, which included "Insurance benefits will be equivalent to those previously provided under the contract but will not be Blue Cross Blue Shield."

At the February 28 meeting, the Union brought up the health care question and was told that no provider had been found. Respondent instructed again that bills should be turned in to the office, which would pay them.

The next meeting took place on April 3. When the Union asked about the health benefit plan, it received the same negative reply. On April 8, the Company offered, and the Union accepted, a 3-percent raise. A few weeks later, Respondent prepared a draft revision of the existing contract, which provided, in pertinent part, the following:

Subject to the terms and conditions of the respective insurance plans and policies carried with the NOBEL' [sic] GROUP BENEFITS Insurance Company, the Company agrees to make the following benefits available to each employee . . . .

(b) The Company will provide without cost to the employee a medical benefits package equivalent to the Blue Cross and Blue Shield [sic] Flex-Care III Comprehensive Major Medical Benefits Insurance Program previously in effect. Copy attached hereto marked Exhibit B.

There was, however, no "Exhibit B" attached to the draft.

At a union meeting on April 26, the union negotiators handed out a summary of the subjects to which it had tentatively agreed, including:

<sup>1</sup> The charge was filed on September 11, 1989, and was amended on October 26. The complaint issued on that same date and was amended on March 9, 1990 (the "1989" date shown on the amended complaint is obviously an error).

<sup>2</sup> Although the complaint and Respondent's pleadings and brief spell the first word in Respondent's name as "Windchester," the company's stationery (and its personnel director) hyphenate it as shown above. See G.C. Exh. 9. Accordingly, I have, sua sponte, amended the caption to reflect what seems to be the correct spelling.

<sup>3</sup> Unless otherwise indicated, all dates hereafter refer to 1989.

<sup>4</sup> There is a good deal of testimony about exactly what word the parties intended to use to describe the proposed substitute insurance. Lamb, an impressive witness overall, says that he consistently employed the word "equivalent," and because that same term appears in several documents authored by Respondent, I think it quite likely that both sides used it. It further seems clear that neither party meant that the program must be identical in all respects, but rather that the coverage should be virtually the same.

Insurance benefits will be equivalent to those previously provided. As of this date the committee has yet to receive [sic] an insurance contract from the company. This contract will not be signed until such a time that the company delivers to us an acceptable health benefit package.

The employees voted to ratify the contract. At this meeting, there were also some complaints from members that the medical bills which, as instructed, they had handed in to the office, and of which none had thus far had been paid, were being turned over by their physicians to collection agencies. The next day, Lamb told Respondent that the Union was activating the January 26 grievance, and he did so in written form on May 12.

On May 15, the Union prepared and signed a summary of the agreed-on amendments to the existing contract, which included:

(7) Insurance benefits will be equivalent to those previously provided under the January 1, 1988 contract, but will not be Blue Cross-Blue Shield.

The Respondent never signed a copy of this document.

Lamb testified that at the next negotiating meeting, in early June, Respondent spoke of its inability to find a provider, although it was "still looking for a policy to provide us with insurance." Reference was made to the Nobel Group Benefits Plan, a third-party administrator for insurance, and Respondent "presented that policy to us at that time." By "that policy," Lamb evidently meant a brochure which briefly summarized the manner in which the Nobel Plan worked, as later described. The Nobel Plan had first been mentioned in April.

Around June 13, at a meeting, Personnel Director Sharpe "gave us his word that he would have the Nobel Group Insurance Package in effect by July 1" and, according to Lamb, that was "sufficient for us." On cross-examination, however, he added that the union representatives agreed to institute the Nobel Plan only "[i]f it was an equivalent policy," and they had asked for further information about Nobel as far back as April. Respondent presented cards to the employees at that time for enrollment in the Nobel Plan, and they were passed out to the unit employees, but because the Union asked the employees to hold the cards until the Union was "sure of the actual benefits that the plan had to offer," no signed cards were turned in. This disabled Respondent from enrolling in the Nobel Plan.

In testifying about the next meeting, on July 5, Lamb said that the meeting originated because "[a]s of July 1st, we had heard nothing about the Nobel Group Benefits Plan being put into effect as promised by the company," so Lamb requested a conference with the Company. At the meeting, Respondent was represented by Secretary-Treasurer Hrkman. According to Lamb, Hrkman said that "the company, at this time, had no intention of providing insurance for us due to financial reasons." Hrkman added that he had to do what Frank Carlow, owner of SME, told him, but "he was on our side." Hrkman mentioned the Union's "options," the first being a strike, but the union representatives replied that such an action would violate the contract. Hrkman also spoke of the Union's right to pursue "legal means," which the union agents said they would investigate. James Miller, a member

of the Union's negotiating committee, substantially corroborated Lamb's testimony.

Hrkman testified that when he met with the Union in July (on the 12th, according to his diary), Lamb asked him if the employees had insurance coverage. When Hrkman said they did not, Lamb reacted "emotionally" and was "visibly upset," expressing his inability to understand how SME's Carlow could treat employees in such a manner. Hrkman denied saying that "Wind-Chester had no intention of providing health insurance." He says that he told Lamb that Respondent recognized its liability to pay qualified post-December 14 bills; that there was, however, no money available for that purpose; and that the bills would be paid when the cash flow permitted, "whenever that is, without stating when that would be, or whether it would be." Hrkman denied inviting the Union to strike, but "recognized that they could strike," which concerned him because Respondent was working with a customer to develop a new line of products. He admits having expressed empathy with the employees. When the union representatives said they would not strike, but would deal with the matter otherwise, Hrkman replied, "You have got to do what you have got to do."

Although I do not think the issue is a critical one, I doubt that Hrkman said unequivocally that Respondent would not provide insurance; I do believe, judging from Lamb's conceded emotional and distraught reaction, and from Hrkman's own testimony, that Hrkman said that the contract would not be honored until Respondent considered itself to be in a financial position to do so. The record shows that on July 11, the Union filed another grievance protesting the failure to provide an insurance program in accordance with the bargaining agreement and to pay medical claims which were turned in as promised. Sharpe's reply on August 3 was "Wind-Chester Roofing Products, Inc., will pay any qualifying medical claims filed by its employees at the Chester, West Virginia plant whenever the Company achieves a financial condition whereby it can meet its current obligations without additional capital subsidy by its owner."

It appears that after the July 5 meeting, when it became clear that the Nobel proposal was not on the table, Respondent made no effort to find other coverage until sometime after October 26, when the complaint issued in this case. As of the hearing, Respondent had still paid none of the outstanding bills submitted by employees to its office, even though Hrkman admitted that there were bills which qualified for payment under the terms of the Flex-Care plan.

There is in evidence a seven-page document said by Personnel Director Sharpe to be a proposal from the Nobel Group to "provide us with . . . third-party administration for a partially self-insured insurance program." Sharpe testified that the proposal was first provided to the Union at the April 3 meeting, which Lamb attended. Lamb was not recalled to rebut this testimony, and I shall therefore credit Sharpe. The proposal provides life insurance, accidental death and disability insurance, and "Duplication of in force plan of medical and short-term disability benefits." The proposal is no more explicit about the medical insurance program to be provided.

It appears from the proposal that Nobel is the administrator of the plan, charging certain fees for its services; and that, under the proposal, Respondent would self-insure a maximum of \$10,500 per employee each year for medical expenses, and thereafter Life Insurance Company of North

America would pay any excess amount. Sharpe testified that under this plan, "We would have given the Nobel Group a copy of the Flex-Care III summary plan, and they would have administered it from that plan booklet." The Union refused, however, to get the necessary cards filled out by the employees when Sharpe handed them to the Union in late June because "they weren't certain about whether or not it satisfied their needs, or whether it satisfied what they thought were their contractual rights."

## II. DISCUSSION AND CONCLUSIONS

Without, as far as I know, any deviation, the Board has held time and again that a party's sustained failure to comply with a provision of a collective-bargaining agreement, without regard to motivation, violates Section 8(a)(5) of the Act. *Oak Cliff-Golman Baking Co.*, 202 NLRB 614, 616 (1973); *Martin E. Keller Roofing Co.*, 297 NLRB 787 (1990).

In the present case, the Respondent admittedly failed to comply, after December 14, 1988, with the health insurance requirement contained in the bargaining agreement which it concededly had adopted. It argues, however, that during the reopener negotiations which began in January, the Union in effect (1) agreed to accept something less than the Flex-Care III Plan specified in the contract, and (2) then made this bargain impossible to fulfill by declining to cooperate in securing the Nobel Plan.

I must first disagree with the suggestion that the Union agreed to accept any substitute program which provided meaningfully different coverage or processing than the Flex-Care Plan afforded. It is quite clear that the Union was simply being cooperative in allowing Personnel Director Sharpe, who boasted of being able to obtain a cheaper plan with the same coverage, to look for one and present it to the Union for approval. It was surely understood by the parties, however, that there would be no substitution until the Union had unmistakably agreed with any program that the Respondent proposed as an alternative.<sup>5</sup>

It is true that certain evidence can be read to indicate that the Union had agreed to accept the Nobel plan. Thus, as shown above, Lamb testified that the genesis of the July 5 meeting was that "[a]s of July 1st, we had heard nothing about the Nobel Group Benefits Plan being put into effect as promised by the company." However, given the other evidence of Union reluctance to blindly substitute the Nobel Plan for the Flex-Care III program (including Hrkman's testimony that the Union did not get cards signed because "they weren't certain about whether or not it satisfied their needs, or whether it satisfied what they thought were their contractual rights"), I do not believe that the record supports a claim that the Union had agreed to the Nobel Plan.

Although the Union did imply that the plan might be acceptable, it plainly was not willing to settle for such a succinct description of the new health insurance as "Duplication of in force plan of medical and short-term disability benefits" (what plan was "in force" after the Flex-Care coverage lapsed in 1988? what sort of coverage of "short-term disability benefits" was contemplated?). An obvious additional complication was the fact that the Nobel Plan was to be heavily self-insured. Given the Respondent's utter failure to

pay bills submitted directly to it since January, the Union's circumspection about accepting such a plan would not be surprising.

In my opinion, the Union probably had no legal obligation to accept any new plan which deviated in the slightest from the Flex-Care program, either under common law or the NLRB. All it agreed to do was to consider any new plan presented to it by Respondent and, if it deemed the plan appropriately equivalent, to accept a substitution.<sup>6</sup> As events materialized, however, the Respondent did not come close to satisfying the Union that it had offered a program which was equivalent to Flex-Care, and the Union's position is fully understandable.

I find, therefore, that the Union acted within its rights by refusing to cooperate in the adoption of the Nobel Plan. This being so, the Respondent violated Section 8(a)(5) after March 11, 1989, by failing to maintain in force the Flex-Care Plan or a Union-approved equivalent. I do not find, however, as discussed above, that on July 5, Respondent stated that it would refuse to provide insurance in the future. Not only am I unsure that such a stark repudiation occurred, but I also conclude, under the precedents earlier cited, that a simple failure to comply with the contract constitutes a violation of the Act.<sup>7</sup>

Whether such a failure of compliance should violate the Act in all circumstances is a question addressed here by Respondent to the wrong tribunal. Board law is quite clear that unilateral modifications "mandated by factors beyond the employer's control" (R. Br. 20) nonetheless abridge Section 8(a)(5). I have some personal sympathy with the view that an employer's "financial constraints" should not necessarily result in a finding of unlawful unilateral action; I am not sure, however, that this is the case in which to press that argument.

As noted, the record suggests that Respondent's owner was not without funds to pay the medical bills which were piling up; Sharpe's August 3 response to grievance 22 merely stated that Respondent would pay the claims when it was able to meet its current obligations "without additional capital subsidy by the owner." The implication is that the owner was simply choosing not to honor his obligation to cover the medical expenses of his employees, amounting perhaps to thousands of dollars, and requiring their payment by the workers instead of by the insurance coverage for which they had bartered their labor.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>6</sup> As Respondent states on brief (Br. 9), it "regarded itself as having an obligation to obtain Union approval of any new insurance plan, even one duplicating the Flex-Care III plan."

<sup>7</sup> The carelessly drawn complaint only alleges a violation beginning July 5. See par. 22. General Counsel's brief, however, seeks a remedy commencing December 14, 1988, and Respondent's brief seems to recognize the logic of such an extension of the principle involved (Br. 20). The matter has been fully litigated, and the remedy should provide for payment of qualified medical expenses incurred after December 14. However, because the 10(b) period of limitations would normally preclude any findings of violations prior to March 11, 1989, 6 months preceding the filing date of the charge, I shall limit my findings accordingly. Although Respondent has not invoked Sec. 10(b), which failure is normally considered a waiver, there was no reason in this case for it to do so, because the complaint only alleged a violation date beginning July 5.

<sup>5</sup> Sharpe testified at one point that the Union had "requested that they give us the approval" to any new plan selected.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to maintain, after March 11, 1989, the health insurance program or its equivalent provided for in the collective-bargaining agreement adopted by Respondent, Respondent violated Section 8(a)(5) and (1) of the Act.

4. The foregoing violation affects commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Aside from the traditional cease-and-desist order and posting of notices, Respondent should be required to make financial amends in order to restore the status quo ante effective March 11, 1989.

There are unresolved issues pertaining to such restoration. At the hearing, Respondent raised a question as to whether all of the medical bills submitted to it qualified as compensable under the Flex-Care Plan, and this question may in turn depend on whether there is a waiting period of exemption under the Flex-Care Plan which applies in these circumstances. Because we do not know enough about these issues, they should be deferred to the compliance stage of this proceeding.

Once it is determined which medical expenses are compensable under the terms of the Flex-Care Plan, Respondent shall reimburse its employees with interest for any losses they suffered by virtue of Respondent's failure to maintain in effect the required health benefit plan. See *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent shall also immediately pay any outstanding unpaid qualified medical bills and forthwith institute the Blue Cross-Blue Shield Flex-Care III Plan referred to in its collective-bargaining agreement or any equivalent plan acceptable to the Union, compensating employees, in any interim period, for qualified expenses.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

<sup>8</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as

#### ORDER

The Respondent, Wind-Chester Roofing Products, Inc., Chester, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to abide by and adhere to its collective-bargaining agreement with the Union by failing to maintain the terms of the Blue Cross-Blue Shield Flex-Care III Comprehensive Major Medical Benefits Insurance Program or any equivalent plan acceptable to the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole unit employees for any uncompensated medical expenditures, and pay any unpaid medical bills, in the manner set forth in the remedy section of this decision.

(b) Post at its facility in Chester, West Virginia, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents has taken to comply.

provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>9</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."